

STATE OF MICHIGAN
COURT OF APPEALS

GUY HISSONG and BETHANY HISSONG,

Plaintiffs-Appellees,

v

MARK R. DANCER,

Appellant,

and

STEWART BRYCE, CAROLYN BRYCE,
COUNTY OF WEXFORD, WEXFORD
COUNTY DEPARTMENT OF PUBLIC WORKS,
and WEXFORD COUNTY LANDFILL,

Defendants-Appellees,

and

JILANE FENNER and FENNER REAL ESTATE,
INC. a/k/a EXIT REALTY OF GREATER
CADILLAC,

Defendants.

GUY HISSONG and BETHANY HISSONG,

Plaintiffs-Appellants,

and

JAMES P. O'NEILL,

Appellant,

v

UNPUBLISHED
March 3, 2011

No. 294956
Wexford Circuit Court
LC No. 06-019885-CE

No. 294997
Wexford Circuit Court

STEWART BRYCE, CAROLYN BRYCE,
COUNTY OF WEXFORD, WEXFORD
COUNTY DEPARTMENT OF PUBLIC WORKS,
and WEXFORD COUNTY LANDFILL,

LC No. 06-019885-CE

Defendants-Appellees,

and

JILANE FENNER and FENNER REAL ESTATE,
INC. a/k/a EXIT REALTY OF GREATER
CADILLAC,

Defendants.

Before: HOEKSTRA, P.J., and CAVANAGH and BORRELLO, JJ.

BORRELLO, J., (*dissenting*).

The facts regarding attorney Mark R. Dancer's involvement with this case are not in dispute. Dancer, on behalf of plaintiffs, filed a complaint in this case on September 14, 2006. On March 9, 2007, attorneys James P. O'Neill and Robert C. Davis were substituted as counsel for plaintiffs. Dancer had no further involvement in the case, nor was he ever informed of any further proceedings in this matter. On September 10, 2009, the trial court granted defendants' motion for sanctions, ordering plaintiffs and their counsel, jointly and severally, to pay defendants \$11,958.81. The parties do not dispute that Dancer was not notified of the proceedings which lead to this decision, nor does any party dispute that Dancer was not afforded an opportunity to present any evidence at any of the proceedings that led to the trial court's ordering of sanctions. Plaintiffs thereafter moved for clarification of the award, and the trial court, without affording Dancer either notice or an opportunity to be heard, made a finding that the original complaint was "frivolous," and since Dancer had filed the original complaint, the trial court reasoned that Dancer, along with O'Neill and plaintiffs, was liable for the award of sanctions.

"Procedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment." *Mathews v Eldridge*, 424 US 319, 332; 96 S Ct 893; 47 L Ed 2d 18 (1976). In determining what process the state must provide before depriving an individual of life, liberty or property, courts must consider three factors: (1) the private interest involved, (2) the risk of erroneous deprivation of that interest and the probable value of additional safeguards, and (3) the state's interest in maintaining its procedure. *Mathews*, 424 US at 335. At the very least, procedural due process requires some form of hearing before an individual is deprived of a property interest. See *Wolff v McDonnell*, 418 US 539, 557-558; 94 S Ct 2963; 41 L Ed 2d 935 (1974). "[T]he right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a

principle basic to our society.” *Joint Anti-Fascist Refugee Comm v McGrath*, 341 US 123, 168; 71 S Ct 624; 95 L Ed 817 (1951) (Frankfurter, J., concurring).

In this case, the trial court assessed sanctions in the amount of \$11,958.81 against attorney Dancer without affording him (1) notice of a potential claim against him or (2) an opportunity to be heard. While recognizing that “[d]ue process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances,” but rather is flexible and calls for such procedural protections as the particular situation demands, I would nevertheless conclude that Dancer was entitled to notice and opportunity to be heard that was adequate to safeguard the right for which the constitutional protection is invoked. *Mathews*, 424 US at 334 (internal quotations and citation omitted). The trial court’s failure to notify Dancer that it was considering imposing sanctions against him coupled with the trial court’s failure to allow Dancer an opportunity to be heard deprived Dancer of his fundamental procedural due process rights guaranteed by our Federal Constitution, US Const, Am V, as well as our Michigan Constitution, Const 1963, art 1, § 17. Because I am confident that Dancer was denied his procedural due process rights, I wholeheartedly reject the majority’s assertions to the contrary. Accordingly, I respectfully dissent from the majority’s opinion in this matter.

I also dissent from the majority’s holding that Dancer can be jointly and severally liable for sanctions in this matter based on the simple, yet seemingly elusive reasoning that the trial court never afforded Dancer an opportunity to testify as to what he did or did not do or know prior to the filing of the complaint. Without such facts, how could the trial court conclude that Dancer failed to make a reasonable inquiry into the facts as required by MCR 2.114? Ironically, the trial court sanctioned Dancer for the very thing it failed to do—conduct a reasonable inquiry into the facts.

The trial court’s actions in this case deprived Dancer of his due process rights in violation of the United States and Michigan Constitutions. Furthermore, the trial court failed to conduct any inquiry into what facts were known to Dancer prior to his filing of the complaint in this matter. Therefore, the factual findings giving rise to the trial court’s legal conclusions reached relative to sanctions were purely speculative. Accordingly, I would reverse the trial court’s order granting sanctions and remand to the trial court for a full and fair hearing on the matter in which Dancer is afforded notice and an opportunity to be heard.

/s/ Stephen L. Borrello